Garcetti v. Ceballos, Official Duties and Free Speech: Is Freedom of Speech Essential to California Statutory Whistleblower Protections?

By

Calvin B. Chang

A contract officer issues a variance report detailing quality failures occurring during the construction of the floodwall system built to protect a city from flooding. An employee of a state crime lab becomes aware of the existence of exculpatory DNA evidence being withheld in a sexual assault case. Public employees are in a unique position to expose governmental inefficiencies and misconduct. However, despite existing legal protections in place to protect whistleblowers from retaliation, pursuing a whistleblower retaliation claim in this area often involves serious personal, financial, and legal hurdles.[1] Despite these obstacles, California's public employees have had a choice of different legal forums available from a mix of constitutional and statutory whistleblower protections.

One cause of action that had previously been available to public employee-plaintiffs, the First Amendment free speech protection, was curtailed by the 2006 decision of the U.S. Supreme Court in *Garcetti v. Ceballos,*126 S.Ct. 1951 (2006). In *Garcetti*, the Supreme Court established that public employees whose speech is made pursuant to official duties are not covered by First Amendment free speech protection. A public employee can no longer pursue a whistle blower retaliation claim under 42 U.S.C. § 1983 on the basis that their "speech" in the exercise of the employee's official duties was protected by the First Amendment. On first impression, the decision in *Garcetti* appears to remove an essential underpinning of Constitutional protection previously afforded to public employee whistleblowers. The question then, is whether this constitutional right to free speech of a public employee is a fundamental underpinning necessary to bring a whistleblower action under California laws. Is a retaliatory action taken against a

public employee based upon "official duties" whistle blowing no longer protected? This article discusses the implications of the U.S. Supreme Court's decision in *Garcetti* in two primary areas: 1) the *Garcetti* free speech "official duties" distinction; and 2) the impact of limits imposed on free speech rights on California statutory protections for public employee whistleblowers.

I. THE *GARCETTI* FREE SPEECH "OFFICIAL DUTIES" DISTINCTION

In *Garcetti v. Ceballos*, the U.S. Supreme Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[2] Respondent Ceballos was a supervising deputy district attorney, who was asked by defense counsel to review a case in which, counsel claimed, the affidavit police used to obtain a search warrant contained misrepresentations. Concluding after the review that the affidavit made misrepresentations, Ceballos communicated his assessment in a disposition memorandum recommending dismissal of the case to his supervisors. Ceballos also testified about his investigation at a hearing that unsuccessfully challenged the warrant. Ceballos was subsequently reassigned, transferred, and denied promotion.[3] Ceballos filed a 42 U. S. C. §1983 suit claiming that petitioners retaliated against him for his memo in violation of the First and Fourteenth Amendments.

The First Amendment claim was dismissed at summary judgment on the grounds that his speech was not constitutionally protected. In reversing the dismissal, the Ninth Circuit applied the *Pickering*[4] and *Connick*[5] standards that the First Amendment free speech applied to public employees' comments on "matters of public concern" [6] through speech engaged in as a "member of the general public." [7] As long established by the Supreme Court, *Pickering* and *Connick*

balances the competing interest of the employee's free speech right on matters of public concern against the employer's interest in "promoting workplace efficiency and avoiding undue workplace disruption."[8]

Prior to *Garcetti*, a public employee plaintiff pursuing a civil rights claim[9] for First Amendment free speech retaliation, had to satisfy a three prong test: (1) the employee engaged in constitutionally protected speech; (2) the employer took adverse employment action against the employee; and (3) the employee's speech was a "substantial or motivating" factor in the adverse action.[10] An additional requisite was that the employee spoke as a citizen and it was on "matters of public concern," as well established by the *Pickering* and *Connick* balancing tests. *Garcetti* introduced an additional delineation that requires the public employee plaintiff to show that the speech at issue was not made pursuant to the employee's official duties. In carving out the official duties distinction, the majority in *Garcetti* reasoned that government employers must be afforded sufficient discretion to manage their operations.[11] "If Cabellos' supervisors thought his memo was inflammatory or misguided they had the authority to take proper corrective action"[12]

In the subsequent case of *Freitag v. Ayers,*[13] the Ninth Circuit applied the *Garcetti* decision to distinguish between those communications that were part of "official duties" and those that were not. In *Freitag*, the plaintiff was a female correctional officer who was disciplined and terminated following her complaints of a sexually hostile work environment. The plaintiff had reported incidents in which inmates had exposed themselves to her and engaging in exhibitionist masturbation while she was in a control tower.[14] The Ninth Circuit applied the *Garcetti* distinction to hold that plaintiff's reports documenting the inmate misconduct (incident reports) were described as "internal forms" and were not constitutionally protected. The court however, described plaintiff's letter to the director of the Department of Corrections as "a closer question,"[15] choosing instead

to refer consideration of it back to the district court who would be in a position to determine "what the union contract provides with respect to the persons to whom such grievances may or must be presented."[16] Finally, the Ninth Circuit held that the plaintiff's letter to a state senator and her report to the California Inspector General constituted protected speech.[17] Under *Garcetti*, the public employee does not lose the right to speak as a citizen simply because the communication was initiated while at work or because they concerned the subject matter of her employment.[18] Therefore, *Garcetti* does not foreclose on all on-the-job acts of whistle blowing by public employees. Only those acts that occur as part of official duties are not protected under First Amendment free speech. Moreover, a public employee's communications made in the workplace can still be free speech, as long as it is the type of communications that is not part of official duties, and so long as it also meets the *Pickering* and *Connick* tests of speech made as a citizen on a matter of public concern.

II. THE IMPACT OF LIMITS IMPOSED ON FREE SPEECH RIGHTS ON CALIFORNIA STATUTORY PROTECTIONS FOR PUBLIC EMPLOYEE WHISTLEBLOWERS

While *Garcetti* forecloses on free speech[19] whistleblower retaliation claims for speech that is made as part of a public employee's official duties, a public employee who pursues a remedy under California whistleblower statutes does not seek and is therefore not required to prove that his/her First Amendment free speech right was violated. Under three of the state's primary[20] whistleblower statutes, a plaintiff pursues a cause of action for violation of his/her right as a public employee to be free from retaliation because she/he had engaged in a "protected disclosure"[21] of "improper governmental activities."[22]

The California Whistleblower Protection Act[23] (CWPA) protects state employees,[24] from retaliation for having reported "improper governmental conduct." The CWPA makes it unlawful to

retaliate against a state employee for making a "protected disclosure" of "improper governmental activities." The CWPA[25] provides both that such retaliation is a crime[26] and provides for civil damages[27] against an employee who engages in retaliation.

CAL. GOV'T CODE § 8547.2(d) defines "protected disclosure" as:

> "…any good faith communication that discloses or demonstrates intention to disclose information that may evidence (1) an improper governmental activity or (2) any condition that may significantly threaten the health or safety of employees or the public if disclosure or intention to disclose was made for the purpose of remedying that condition."[28]

Similarly, the Whistleblower Protection Act[29] (WPA) prohibits retaliation against a public employee (including local government employees)[30] for making protected disclosures to a legislative committee. Both acts allow an action for civil damages against the offending employee by the offended employee.[31] Like the WPA, California Government Code § 12653(b) prohibits an employer from harassing, discriminating against, or any other manner of discriminating against an employee who acts in furtherance of the False Claims Act.[32] Finally, the California Labor Code (§ 1102.5 et seq.) prohibits retaliation against an employee for disclosing information regarding violations of a state or federal statute to a governmental agency.

CAL. LABOR CODE § 1102.5(b) provides as follows:

> "An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation."[33]

Recent amendments[34] to the Labor Code provisions[35] have transformed these provisions into a general whistleblower statute applicable to all local and state public employees who disclose

violations including those reports made internally[36] within their own agencies. An employee injured by a violation can recover damages from her/his employer.[37] A violation of the chapter is also a misdemeanor crime.[38] A Labor Code [§ 1102.5(b)] whistleblower retaliation cause of action follows a comparable framework of elements of a FEHA discrimination retaliation case.[39]

There are three elements that frame a prima facia retaliation case under California's whistleblower statute [LABOR CODE § 1102.5(b)]: (1) the employee engaged in a protected activity (disclosure of improper governmental activity); (2) the employer subjected the employee to an adverse employment action; and (3) there is a causal link between the protected activity and the employer's action"[40] (the protected disclosure was a substantial or motivating factor in the adverse action). First Amendment Free speech is not an element of required proof at issue in California statutory whistleblower retaliation cause of actions. Therefore, the existence of *Garcetti* should not be the hurdle to pursuing public employee whistleblower claims that it might have appeared to be on first impression. California whistleblower statutes[41] remain a viable cause of action for state and local public employees to address retaliation for having engaged in a "protected disclosure" of "improper governmental activities."

III. CONCLUSION

The U.S. Supreme Court decision in *Garcetti v. Ceballos* limits an employee's free speech rights by excluding those acts of whistle blowing that occur during the course of official duties. What *Garcetti* did was to say that speech that is part of official duties of employment is not a constitutional right protected by the First Amendment. While *Garcetti* narrows a 42 U.S.C. § 1983 cause of action, the unavailability of that cause of action to enforce a constitutional

protection in the narrow area of official duties, should not foreclose on all on-the-job acts of whistleblower protections.

Under California whistleblower statutes, the First Amendment right to free speech is not a *required* underpinning necessary to make unlawful, an employer's retaliation against an employee who makes a protected disclosure, whether or not that disclosure was during the course of official duties or otherwise. California's state statutory whistleblower protections remain a viable cause of action by public employee's who suffer retaliation as a result of reporting governmental misconduct.

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[1] Exhaustion of administrative remedies, exhaustion of judicial remedies, Tort Claims Act, governmental immunities, CAL CODE CIV. PROC. § 425.16 anti-SLAPP statute, etc.
[2] *Garcetti v. Ceballos,* 126 S. Ct. 1951 (2006) at1960.
[3] *Id.* at 1955-56.
[4] *Connick v. Myers*, 461 U.S. 138 (1983).
[5] *Pickering v. Board of Education*, 391 U.S. 563 (1968).
[6] *Connick v. Myers*, 461 U.S. 138 (1983).
[7] *Pickering v. Board of Education*, 391 U.S. 563 (1968).
[8] *Id* at 573-74.
[9] 42 U.S.C. § 1983.
[10] *Freitag v. Ayers*, 468 F.3d 528, 543 (Ninth Cir. 2006) quoting Coszalter v. City of Salem, 320 F.3d 968, 973 (Ninth Cir. 2003).
[11] *Garcetti v. Ceballos,* 126 S. Ct. 1951 (2006) at 1960.
[12] *Id.* at 1960-1961.
[13] *Freitag v. Ayers*, 468 F.3d 528, (Ninth Cir. 2006).
[14] *Id.* at 533.
[15] *Id.* at 546.
[16] *Id.* at 546.
[17] *Id.* at 545.
[18] *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006) at 1959.
[19] 42 U.S.C. § 1983
[20] Other statutes prohibit retaliation: CAL. LAB. CODE § 6300 et seq. California Occupational Safety and Health Act of 1973, § 6310(a), False Claims Act CAL. GOV'T CODE § 12650(a).
[21] CAL. GOV'T CODE § 8547.2(d) defines "protected disclosure."
[22] CAL. GOV'T CODE § 8547.2(b) defines "improper governmental activities."
[23] CAL. GOV'T CODE § 8547 et seq.
[24] CAL. GOV'T CODE § 8547.2 (a): "Employee" means any individual appointed by the Governor or employed or holding office in a state agency…any employee of the California State University. (Similarly, § 8547.10(a): "A University of California employee, including an officer or faculty member, or applicant for employment ... ").

[25] CAL. GOV'T CODE § 8547et seq.
[26] CAL. GOV'T CODE § 8547.8(b): "any person who intentionally engages in acts of reprisal, retaliation … for having made a protected disclosure, is subject to a fine not to exceed then thousand dollars ($10,000) and imprisonment in the county jail for a period not to exceed one year."
[27] CAL. GOV'T CODE § 8547.3(c).
[28] CAL. GOV'T CODE § 8547.2(d).
[29] CAL. GOV'T CODE § 9149.20 et seq.
[30]CAL. GOV'T CODE § 9149.22(b): "Employee means … or any (employee of) agency of local government, as defined in subdivision (d) of Section 8 of Article XIIIB of the California Constitution."
[31]CAL. GOV'T CODE § 9149.22(b): "Any employee who violates subdivision (a) may be liable in an action for civil damages brought against the employee by the offended party."
[32] CAL GOV'T CODE § 12652.
[33] CAL. LAB. CODE § 1102.5(b).
[34] See Senate Bill 777 (2003-2004 Reg.Sess.) (An act to amend Sections 1102.5 and 1106 of, and to add Sections 1102.6, 1102.7, 1102.8, and 1102.9 to, the Labor Code, relating to whistleblowers). (Approved by Governor September 22, 2003, Chapter 484, Statutes of 2003).
[35] CAL LAB. CODE § 1102.5 et seq.
[36] CAL. LAB. CODE § 1102.5(e): "A report made by an employee of a government agency to his or her employer is a disclosure of information to a government or law enforcement agency pursuant to subdivisions (a) and (b)."
[37] CAL. LAB. CODE § 1105.
[38] CAL. LAB. CODE § 1103: "Any employer who violates this chapter is guilty of a misdemeanor punishable, in the case of an individual, by imprisonment in the county jail not to exceed one year or a fine of not to exceed $1,000 or both and, in the case of a corporation, by a fine of not to exceed $5,000."
[39] *Akers v. County of San Diego* (2002) 95 Cal.App.4th at 1453.
[40] *Id* at 1453; see also *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th at 1028.
[41] CAL. GOV'T CODE § 8547et seq. for state, CSU, and UC employees; CAL LAB. CODE § 1102.5 et seq. for state, local, and private employers.